No. 18-481

IN THE
Supreme Court of the United States

FOOD MARKETING INSTITUTE,
Petitioner,

v.

ARGUS LEADER MEDIA D/B/A ARGUS LEADER,
Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS NEW HAMPSHIRE RIGHT TO LIFE IN SUPPORT OF RESPONDENT

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RULE 29.6 STATEMENT

Petitioner New Hampshire Right to Life ("NHRTL") is a New Hampshire not-for-profit corporation that has no parent company.

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INTEREST OF AMICUS CURIAE[1]

New Hampshire Right to Life (NHRTL) seeks to foster respect for life from the moment of fertilization to natural death. It educates its members and the public through ongoing public-record requests and analyses, including the problems with and abuses in taxpayer funding of abortion clinics.

Previous requests under the Freedom of Information Act, 5 U.S.C. 552, have revealed that the federal Department of Health and Human Services was—and perhaps still is—reimbursing Planned Parenthood for birth control drugs at approximately 388% the rate the same drugs were being sold to the public at Walmart. NHRTL used this information to educate the public and campaign to stop the wasteful taxpayer funding of abortion clinics. Other public record requests have shown that Planned Parenthood was spending hundreds of thousands of dollars lobbying and promoting increased taxpayer funding of its clinics and the election of abortion-on-demand politicians.

Americans deserve to know how the federal government is spending their hard earned tax money and if that money is being funneled to groups that are misusing it. Unfortunately, not all of NHRTL's

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[1] Pursuant to Supreme Court Rule 37(6), amicus states that no party other than the amicus and its counsel authored this brief in whole or part nor contributed money that was intended to fund preparing or submitting this brief. Both parties have consented in writing to the filing of this brief in blanket consents on file with the Court.

Freedom of Information Act (FOIA) requests have been fully successful. Many documents regarding how much certain abortion clinics charge the taxpayer and how the clinics ultimately spend their taxpayer funds have been withheld under a broad, atextual application of FOIA's Exemption 4. *E.g.*, *N.H. Right to Life* v. *Dep't of Health & Human Servs.*, 778 F.3d 43, 49–52 (1st Cir. 2015); *N.H. Right to Life* v. *Dep't of Health & Human Servs.*, 136 S. Ct. 383, 384 (2015).

NHRTL will have future FOIA requests that courts will similarly deny if this Court allows the lower courts' broad, atextual reading of Exemption 4 to continue. Accordingly, NHRTL has a strong interest in the courts applying FOIA as Congress wrote it. Interpreting Exemption 4 in accord with its plain meaning will result in the transparency that Congress intended while allowing all citizens to know how the government spends their tax dollars.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The public has a right to know how its government acts and decides to spend taxpayer dollars. An agency cannot secretly award contractors millions of dollars in public funds without public scrutiny of that spending.

Recognizing this reality, Congress enacted FOIA, 5 U.S.C. 552. The statute operates "to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA* v. *Mink*, 410 U.S. 73, 80 (1973). The law's primary purpose is "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force* v. *Rose*, 425 U.S. 352, 361 (1976). FOIA accomplishes this by broadly mandating disclosure unless one of nine narrow exemptions specifically applies. Exemption 4, at issue in this case, exempts "trade secrets and commercial or financial information[,] obtained from a person [that is] privileged or confidential." 5 U.S.C. 552(b)(4).

Several courts of appeal have refused to narrowly apply Exemption 4's text and have instead greatly broadened the statutory exemption—thereby limiting the public's access to information—to preclude disclosure whenever a third party alleges that disclosure of public knowledge may result in "substantial harm." *Nat'l Parks & Conservation Ass'n*

v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). This is contrary to FOIA's purpose and plain text.

Instead of piercing the veil of administrative secrecy, atextual judicial standards for applying Exemption 4 tend to shield government contractors so they do not face competition that could save the American taxpayer millions of dollars. *E.g.*, *N.H. Right to Life* v. *Dep't of Health & Human Servs.*, 778 F.3d 43, 49–52 (1st Cir. 2015) (Title X funding to abortion clinics); *Canadian Commercial Corp.* v. *Dep't of Air Force*, 442 F. Supp. 2d 15, 33 (D.D.C. 2006), aff'd, 514 F.3d 37 (D.C. Cir. 2008) (defense funding); *Utah* v. *U.S. Dep't of Interior*, 256 F.3d 967, 970 (10th Cir. 2001) (leasing of land); *Hodes* v. *U.S. Dep't of Treasury*, 342 F. Supp. 3d 166, 174 (D.D.C. 2018) (collection of delinquent taxes). The federal courts should apply FOIA as written and not create tests by judicial fiat that broaden the statutory language.

Amicus New Hampshire Right to Life agrees with Petitioner Food Marketing Institute that this Court should reject the *National Parks* test. Nevertheless, contrary to Petitioner's arguments, rejecting *National Parks* does not require this Court to overrule the Eighth Circuit's judgment. Exemption 4's plain text does not shield any information a private party deems "confidential." It applies only to trade secrets, privileged information, and information Congress has actually designated confidential via statute or by properly authorized regulation.

This Court should hold that information is "confidential" only when the government has determined, via statute or rule, that such information must be held in confidence. Such a rule is consistent with (1) the statutory text, (2) how Exemption 4 was interpreted before *National Parks*, and (3) how this Court has interpreted "confidential" in Exemption 7 for purposes of "confidential informants" in criminal investigations. See *U.S. Dep't of Justice* v. *Landano*, 508 U.S. 165, 172 (1993). Courts should not guess at whether the release of public documents might harm a future commercial interest. It is only when the government, through a statute or duly authorized regulation, accords public records confidential status that Exemption 4 applies.

Allowing government contractors to self-servingly designate all of their applications for taxpayer funds "confidential" is illogical and has no basis in the statutory text. It would only worsen the problem of government contractors avoiding both public oversight and competition for public funds.

Although the Eighth Circuit wrongly applied the *National Parks* test, this Court should affirm its judgment. Congress could have, but did not, designate the information sought in this case as confidential. That reality is readily apparent from the fact that, *after* the FOIA request was made in this case, and the Eighth Circuit had held 7 U.S.C. 2018 inapplicable to the information requested, Congress amended 7 U.S.C. 2018 to arguably deem that, prospectively, the requested SNAP retailers' redemption

information would be deemed confidential and not subject to disclosure. Agric. Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490; Pet. Br. 45 n.29.

Petitioner argues that this amendment made the requested information more clearly confidential, Pet. Br. 45 n.29; the Respondent argues that the amendment does not change the applicability of the statute to the requested documents, Resp. Br. 17–23. But this Court need not address this dispute because Petitioner never appealed the Eighth Circuit's 2014 decision that 7 U.S.C. 2018(c) is not applicable to the requested documents. "Only the questions set forth in the petition, or fairly included therein, will be considered by the Court." *Yee* v. *Escondido*, 503 U.S. 519, 535 (1992) (quoting *Berkemer* v. *McCarty*, 468 U.S. 420, 443 n.38 (1984)). Since no question presented asks whether 7 U.S.C. 2018(c), either originally or as amended, precluded the disclosure of the information, it is not before the Court.[2]

Accordingly, the requested information is not "confidential" for purposes of Exemption 4 or any of the other FOIA exemptions. USDA is obligated to produce the documents to Argus Leader.

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[2] The Eighth Circuit rejected USDA's original argument that the SNAP statute, 7 U.S.C. 2018, made the requested documents exempt under FOIA Exemption 3. *Argus Leader Media* v. *U.S. Dep't of Agric.*, 900 F. Supp. 2d 997 (D.S.D. 2012), rev'd and remanded, 740 F.3d 1172 (8th Cir. 2014). This decision was never appealed. USDA then argued that the information was exempt under Exemption 4. So, the only issue in this appeal is whether Exemption 4 applies.

ARGUMENT

I. The *National Parks* standard ignores FOIA's plain text and has proven unworkable in practice.

FOIA allows citizens to see how their government works, including how their government spends taxpayer dollars. It requires "full agency disclosure unless information is exempted under clearly delineated statutory language." *Fed. Open Mkt. Comm. of Fed. Reserve Sys.* v. *Merrill*, 443 U.S. 340, 351–52 (1979). "[C]onsistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass." *U.S. Dep't of Justice* v. *Tax Analysts*, 492 U.S. 136, 151 (1989); accord *FBI* v. *Abramson*, 456 U.S. 615, 616 (1982) ("FOIA exemptions are to be narrowly construed").

Nevertheless, when it comes to Exemption 4, several courts of appeal have refused to narrowly apply the text and have instead greatly broadened the statutory exemption to preclude disclosure whenever a third party alleges that public knowledge may result in "substantial harm." *Nat'l Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). This is contrary to FOIA's plain text and purpose.

Making matters worse, the courts of appeals have applied *National Parks* inconsistently. Some courts have made Exemption 4 even broader than *National Parks* already did.

On one hand, the Fourth, Fifth, and Eighth Circuits apply the *National Parks* test in its original form. These circuits require that harm be "substantial" and result from "actual competition" before allowing Exemption 4 to prevent disclosure. *E.g.*, *Hercules, Inc.* v. *Marsh*, 839 F.2d 1027, 1030 (4th Cir. 1988) (where a "contract is not awarded competitively, the prospect of competitive injury from releasing [the documents] is remote."); *Sharyland Water Supply Corp.* v. *Block*, 755 F.2d 397, 399 (5th Cir. 1985) (competition with other water suppliers is "insignificant"); see also *Argus Leader Media* v. *U.S. Dep't of Agric.*, 889 F.3d 914, 916 (8th Cir. 2018) (information that may be "marginally" helpful to competitors will not result in "substantial" harm).

On the other hand, the First Circuit has expanded *National Parks* to bar disclosure whenever a third party alleges the possibility of some future harm from theoretical competition for government grants. *N.H. Right to Life*, 778 F.3d at 49–52; see also *Canadian Commercial Corp.* v. *Dep't of Air Force*, 442 F. Supp. 2d 15, 33 (D.D.C. 2006), aff'd, 514 F.3d 37 (D.C. Cir. 2008). This rule has transformed FOIA from a disclosure statute to a withholding statute.

Specifically, the First Circuit held that Planned Parenthood's Manual of Medical Standards and Guidelines was exempt from disclosure under Exemption 4. *N.H. Right to Life*, 778 F.3d at 49–52. Planned Parenthood submitted that manual as part of a noncompetitive grant request for over $1 million tax-payer dollars, making it a public record. Because

the First Circuit theorized that disclosing the manual may possibly harm Planned Parenthood's competitive position in some hypothetical future grant application, it held that Exemption 4 applied. This holding was unrelated to Exemption 4's text or even the *National Parks* test as written. Yet the holding allowed Planned Parenthood to shield its manual from public disclosure. The *National Parks* test has thus taken on a life of its own, resulting in a cloak of secrecy surrounding how abortion clinics spend federal tax dollars in New Hampshire.

What's more, the problem is neither limited to New Hampshire nor federal funding of abortion clinics. Lower-court decisions have precluded taxpayers from seeing how their money is being used in a broad variety of contexts, in many jurisdictions. For example, the D.C. District Court applied *National Parks* to exempt from disclosure contractor application materials that would show how much the IRS pays to third-party debt collectors for certain types of collection. *Hodes*, 342 F. Supp. 3d at 174. The court held that if inflated prices were disclosed, the current contractor would be harmed as it "would enable competitors to (1) gain insight into the awardees' pricing strategy and (2) underbid the awardees in future competitive bidding processes for IRS debt collection or other similar contracts." *Id.* at 176.[3]

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[3] Just a few years ago, another court rejected a similar argument. *Raher* v. *Fed. Bureau of Prisons*, 749 F. Supp. 2d 1148, 1158–61 (D. Or. 2010) (finding argument that a "competitor could use the redacted information to inform its bidding in future

In other words, if the public knew how much the taxpayer was overpaying on this contract, the IRS would receive competitor applications to provide the same service for less. That is precisely the type of publicly beneficial information that Congress ordered to be disclosed.

The Tenth Circuit held that *National Parks* precluded disclosure of lease terms for the storage of nuclear fuel for a similar reason: if the federal government's terms were made public, it would result in others "undercutting prices" in future applications. *Utah* v. *U.S. Dep't of Interior*, 256 F.3d 967, 970 (10th Cir. 2001). But turning the light on how the government spends taxpayer funds is precisely what FOIA is designed to accomplish.

The D.C. District Court likewise held that "disclosure of Northrop Grumman's proposed wrap rates [for NASA] would permit competitors to undercut Northrop Grumman's bids" in future federal contract requests. *Northrop Grumman Sys. Corp.* v. *Nat'l Aeronautics & Space Admin.*, 346 F. Supp. 3d 109, 119 (D.D.C. 2018). Accord, *e.g.*, *Canadian Commercial Corp.* v. *Dep't of Air Force*, 442 F. Supp. 2d 15, 33 (D.D.C. 2006), aff'd, 514 F.3d 37 (D.C. Cir. 2008) (public disclosure of prices charged by Air Force contractor would result in contractor's costs and

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competition for similar contracts . . . to be no more than a theoretical possibility.") While application of the substantial competitive harms test of *National Parks* should be rejected in total, the fact that it appears to have been broadened in recent years makes it all the more troubling.

pricing information being undercut by competitors for future air force contracts). Many courts have similarly withheld the disclosure of pricing information in government contracts because the current contractor might be underbid by less expensive competitors, even though disclosure saves taxpayer money. And even in those circuits where *National Parks* is applied more narrowly, that standard mandates the atextual analyses of whether any competitive harms to a third party are "substantial." *E.g.*, *Argus Leader Media* v. *U.S. Dep't of Agric.*, 889 F.3d 914, 916 (8th Cir. 2018).

This *post hoc*, case-by-case analysis also results in substantial delays in obtaining public documents as the parties fight over which competitor harms are, in fact, substantial. For example, in the present case, the SNAP documents at issue were requested in 2011 and the Eighth Circuit did not issue its decision until seven years later in 2018. The Argus Leader still has not received the requested documents that pertain to the 2005 to 2010 fiscal years.

The FOIA statute does not envision the passage of several years before the public actually receives requested documents. The statute requires that agencies "shall make the records *promptly* available." 5 U.S.C. 552(a)(3)(A) (emphasis added). In fact, the statute requires agencies to respond to requests within 20 days.[4] 5 U.S.C. 552(a)(6)(A). The *National*

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[4] Though the original deadline was 10 days, the time period was increased to 20 days in amendments adopted in 1996. Electronic Freedom of Info. Act Amendments of 1996, Pub. L. No. 104–231, 110 Stat. 3048.

Parks test makes it practically impossible to comply with the statutory timeframes. Before an agency releases documents, the business submitter is entitled to a reasonable period of time to make objections. Executive Order 12600; 45 C.F.R. 5.42. If the agency makes a disclosure decision and the business submitter disagrees, it is entitled to further time to make objections that preserve the confidentiality of the questioned documents. Executive Order 12600. The *National Parks* standard leads to substantial delays in the disclosure of information regarding how the federal government spends the public's money.

In sum, the judiciary's Exemption 4 expansion has resulted in less disclosure and increased secrecy involving government contracting and grants. That outcome thwarts "the protection of the public fisc[, which] is a matter that is of interest to every citizen." *Brock* v. *Pierce Cty.*, 476 U.S. 253, 262 (1986). "[A] democracy cannot function unless the people are permitted to know what their government is up to." *Mink*, 410 U.S. at 105 (Douglas, J., dissenting).

Congress did not write Exemption 4 to help government contractors secretly overcharge the government. FOIA is a tool that ensures "an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *N.L.R.B.* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). This Court should reject the *National*

Parks test and instead interpret Exemption 4 narrowly according to its plain language.

II. The term "Confidential" in Exemption 4 should be narrowly construed.

In *National Parks* and its progeny, the courts of appeal chose to read Exemption 4 as broadly as possible to maximize protection of government vendors. That approach was wrong. When interpreting other FOIA exemptions, this Court has repeatedly recognized that they "are to be narrowly construed." *Abramson*, 456 U.S. at 616; *Tax Analysts*, 492 U.S. at 151 ("[C]onsistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass."). Consistent with the rest of FOIA, the Court should apply the same narrow approach to Exemption 4's interpretation.

In drafting Exemption 4, Congress did not broadly exempt all information that a business working as a government contractor may wish to keep confidential. Congress certainly did not broadly exempt any information that may harm such a business. It only exempted "trade secrets and commercial or financial information[,] obtained from a person [that is] privileged or confidential." 5 U.S.C. 552(b)(4). This Court should interpret these words narrowly.

As a starting point, this means that government contractors do not decide what information FOIA requires them to disclose. Contra, *e.g.*, Marine Mammals Br. 29 ("The word 'confidential' in Exemption 4 should be construed to mean that

whatever information a party designates and treats as 'confidential.'") Such an approach is hardly narrow. And it leads to a fox-in-the-henhouse problem: any government contractor engaged in fraud or overbilling has unilateral veto power over any public request for information. There is nothing in Exemption 4's plain language that even suggests Congress intended such an anti-disclosure outcome when enacting a FOIA statute designed to increase government transparency.

In addition, under the doctrine of *noscitur a sociis*, a word in a statute is known by the company it keeps. *Lagos* v. *United States*, 138 S. Ct. 1684, 1688–89 (2018). Here, the word "confidential" appears in context with the word "privileged." Privileged information, such as documents disclosed as part of an attorney-client or priest-penitent relationship, is considered virtually sacrosanct, necessitating the strongest public-policy reasons to overcome the privilege and mandate disclosure. The word "privileged" should be similarly construed. If Congress wanted to do so, it could have easily exempted all commercial or financial information that a contractor provides to the government. Congress rejected that approach.

Accordingly, this Court should interpret Exemption 4 narrowly as encompassing only truly "confidential" information, similar to inherently-privileged documents. Under this standard, commercial or financial information pertaining to the payment of government funds to a private entity is the easy case. Such data necessarily implicates not

only the commercial and financial interests of the contractor, but also the disclosure and transparency interests of the government and the public. As the United States recognized in its amicus brief: "In this case, store-level SNAP-redemption data necessarily corresponds to the government's own payments of federal funds (through EBT processors) to the stores. That fact significantly diminishes any basis for finding the information to be 'confidential' for purposes of Exemption 4." U.S. Br. 26. Congress did not write FOIA to shield the public from knowing how the government spends taxpayer dollars.

III. Whether information is categorized confidential should depend on statutes and regulations, not contractor discretion.

Before the *National Parks* decision, courts looked to Exemption 4's text and held that the government could withhold commercial documents in response to a FOIA request only where there was an "express or implied promise by the government that the information will be kept confidential." *Gen. Servs. Admin.* v. *Benson*, 415 F.2d 878, 881 (9th Cir. 1969). This is a practical and easy-to-apply rule that has the added benefit of being consistent with how this Court has interpreted other FOIA exemptions.

A test based on the express or implied promise of confidentiality is similar to the standard that this Court announced in *Landano*, 508 U.S. at 172. There, this Court held, for the purposes of FOIA Exemption 7, that a law enforcement agency's "confidential

source" is considered confidential only when there has been an explicit or implied assurance of confidentiality. It would be passing strange to hold that government contractors receive greater protection from FOIA disclosure than the government's criminal informants.

Consistent with *Landano*, a promise of confidentiality must be made by someone authorized to make such a promise. A promise by an official not authorized to act cannot be used to thwart public access to information about how taxpayer dollars are spent. This Court long ago recognized that "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power." *Fed. Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947). Individual officials cannot by practice or pronouncement deem information confidential. Accordingly, there must be a statute or duly-promulgated regulation on point.

For example, in 41 C.F.R. 60-40.3, the Department of Labor ruled "portions of affirmative action plans such as goals and timetables which would be confidential commercial or financial information because they indicate, and only to the extent that they indicate, that a contractor plans major shifts or changes in his personnel requirements and he has not made this information available to the public." In

other words, the DOL by promulgated rule brought a certain category of information within Exemption 4's scope. Similarly, the USDA adopted a rule categorizing as confidential applications for agricultural research funding. Under 7 C.F.R. 3430.21, "[n]ames of submitting institutions and individuals, as well as application contents and evaluations, will be kept confidential." Accord, *e.g.*, 7 C.F.R. 278.1(q)(3)(iv) (designating social security numbers and related records as "confidential").

Congress also can and has specifically designated categories of information to be confidential by statute. 26 U.S.C. 6103(a), for example, provides that tax returns and return information "shall be confidential." 42 U.S.C. 299b-22 provides that hospitals' patient safety work product "shall be confidential." 35 U.S.C. 122(a) provides that "applications for patents shall be held in confidence." 7 U.S.C. 2426 likewise provides that "[a]pplications for plant variety protection and their contents shall be kept in confidence." See also 15 U.S.C. 57b-2; 7 U.S.C. 2619; 7 U.S.C. 4912. Congress has determined in several different categories—including arguably the information at issue here (prospectively)—that certain commercial information should be confidential and not released in response to a FOIA request.

In the present case, the USDA argued that it had made promises of confidentiality regarding the SNAP benefits through its "long standing policy." Decl. of Div. Dir. Andrea Gold, JA 71–72. But in the absence

of any statute or promulgated rule stating that policy, such an affidavit is legally insufficient to create a categorical exemption that would deprive the public of important information about government contracts and contractors.

Alternatively, the USDA initially argued, and the District Court initially held, that the SNAP statute, 7 U.S.C. 2018,[5] made the requested documents exempt under FOIA Exemption 3. *Argus Leader Media* v. *U.S. Dep't of Agric.*, 900 F. Supp. 2d 997 (D.S.D. 2012), rev'd and remanded, 740 F.3d 1172 (8th Cir. 2014). The Eighth Circuit reversed, holding that while the SNAP statute made some documents exempt from disclosure, it did not affect the documents Argus Leader was requesting. That holding, which was correct, was allegedly the impetus for Congress to deem the documents confidential in future cases. See Agric. Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat 4490; see also Pet. Br. 45 n.29; but see Resp. Br. 17–23 (arguing the statutory amendment does not apply). The fact that Congress statutorily designated certain information confidential shows that such determinations can be made when appropriate.

So, whether information should be shielded from public scrutiny because disclosure would result in

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[5] That statute provides: "Regulations issued pursuant to this chapter shall provide for safeguards which limit the use or disclosure of information obtained under the authority granted by this subsection to purposes directly connected with administration and enforcement of the provisions of this chapter or the regulations issued pursuant to this chapter."

substantial competitive harm is a legislative decision, not a judicial determination. Congress not only can but has actively deemed certain information confidential. Courts should follow its lead rather than determining confidentiality on a case-by-case basis.

* * *

This Court should reject the *National Parks* test and interpret Exemption 4 according to its plain language. Relying on hypothetical harms to government contractors has prevented uncovering thousands of overpriced contracts and saving millions in taxpayer funds. Expanding Exemption 4 to exempt any information a contractor deems confidential exacerbates the injury to FOIA, the public fisc, and all tax payers.

Just as this Court has interpreted "confidential" in Exemption 7 to apply only when a properly authorized government actor has given an informant assurance of confidentiality, the term "confidential" in Exemption 4 only applies when Congress by statute or an agency through regulation has provided an assurance of confidentiality. The Eighth Circuit's judgment in *Argus Leader Media* v. *U.S. Dep't of Agric.*, 889 F.3d 914, 916 (8th Cir. 2018), should be affirmed not because it correctly applied *National Parks*, but rather because, at the time of the request, neither Congress nor USDA had deemed the information "confidential."

CONCLUSION

The court of appeals should be affirmed.

Respectfully submitted,

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